Remarks of Justice Harry A. Blackmun at the Judicial Conference of the Eighth Circuit in Kansas City, Missouri, August 1990

Hon. Harry A. Blackmun

Hon. Pasco M. Bowman: Our next speaker and our final speaker for this morning certainly needs no introduction to this Conference. He, like Judge Webster, is truly one of our own. Would you please join me in welcoming Associate Justice Harry Blackmun.

Hon. Harry A. Blackmun: The only real excuse for standing up is that we are all tired on the backside and it feels rather good to stretch a little bit. These are hard acts to follow and that, Mr. Chairman, always seems to be my lot at the Eighth Circuit Conference. Let me be more formal then and say Mr. Chairman; Chief Judge Lay; Mr. Director, Judge--you have so many titles I can't keep up with you, Bill; Mr. Solicitor General; my colleagues of the state bench at various levels; and my colleagues of the federal bench at various levels; distinguished guests; and let me say generally, coworkers in the vineyard of the law; and finally and all inclusive, friends, I hope, although yesterday I wondered a little bit about that one. I will say what some of the others have said--that it is always good to get back in the Eighth Circuit. This is home. Dottie and I, Mrs. Blackmun and I missed your gathering in 1989 in Minneapolis because we were in Salzburg at the same time. A number of you have kindly made inquiry about Dottie; she is fine. She has a little surgery scheduled for ten days hence but it isn't anything to be concerned about, and she sent her love and affection to her many friends here. Sometimes I tell her that's a lot more than I receive and she said "you are never around. You are always down at that building," and so it is.

Let me interpose one comment about Salzburg last year. I well remember among the promising young judges and attorneys that were there, there were two from Czechoslovakia who were hesitant in their comments and very reserved about taking positions. And yet, as Judge Webster has indicated, changes have come about and we have heard from nearly all of those who are present from behind the Iron Curtain, postcards perhaps or letters, indicating that there is a new wind that is blowing in certain quarters in Europe. Well, as I say every year, I suppose I say the same thing, it has been quite

a year, quite a Term actually. But it has been quite a year for all of us. The transformation in Europe from what I just indicated about the young people in Salzburg; earthquake in San Francisco; earthquake in Iran; earthquake in the Philippines; South Africa and Mr. Mandela; the troubles in Washington with the ongoing trial of its mayor; the S and L crisis, I say that in the plural really; the issue of no taxes or some taxes; the Chinese situation.

For myself, and I speak a little personally at this point, it has been an active year apart from the Court because I followed some old precedence of trying to get around a little bit in the country to see what is going about. We had the privilege of being at Chicago for the annual Civil Rights Committee celebration there; visiting Buena Vista College in Iowa which you people from that state will well know; the Women's Bar Association in the District of Columbia where some of us with lawyer daughters had to stand up with them and answer questions and that is an experience that I hadn't experienced before; Southern Methodist University School of Law honoring Judge Irving Goldberg of the Fifth Circuit; University of Miami; Yale. I told Arthur Miller yesterday that they are very nice to us at Yale and the result is that Dottie and I have sweatshirts with Yale emblazoned on it. I don't have anything like that from Harvard! I think they are just more generous in New Haven then they are in Cambridge. The AMA at its winter meeting in Phoenix with some medical legal problems at issue. The American Psychological Association regional meeting at Williamsburg. Brandeis University's annual gathering in New York City. A combination Cleveland Clinic, Cleveland Marshal College of Law in that city in their combined efforts toward medical legal problems and their solutions. The Federal Bar Council in New York City; the American Psychiatric Association in New York; Washington and Lee in Lexington, Virginia, where they are honoring Justice Powell by establishing a memorial there in his name. It was his school. And then not too long ago another reunion of my clerks now numbering eighty, and sixty-eight were there. I think they feel that with every passing year there is a little less likelihood of my being

there the next year so we better get it over with and have another one. That is always fun I think. The reaction is * * * [large blank gap on tape] * * *

judgment I do not know. And then, of course, I think worthy of note are the child abuse cases. We had two. The important one I suppose is Maryland vs. Craig. The problem of the competency of child witnesses to testify and to face the accuser, the one charged with abuse. What does the confrontation clause mean? Extraordinarily difficult issues. I think for those of you in litigation, particularly in the seemingly increasing and more public approach to child abuse cases, those must be of interest to you.

Well, statistics, the Solicitor General mentioned some of them. There is an overall increase in the filings in the Supreme Court and yet all of that increase is on the in forma pauperis side. The paid cases showed a decrease but there is a greater increase on the IFP side than there is a decrease on the paid side. We were very close to 5,000 last year. It has been said there were 129 signed opinions. This is true. It is the lowest number for some time. The certs granted certainly have decreased. Actually, the December session upcoming is not yet full. There are, I think, ten slots not filled. And, of course, anything granted in October unless it is expedited cannot be heard by the end of the calendar year anyway so we will have a short session probably in December. Why? We wondered about it a little bit and speculate and repeatedly at our Friday conferences say this is an extraordinarily thin list so far as substance is concerned on the paid side. The cases are there but there is something less than cert worthiness, as the clerks call it, among the cases. There is no conscious effort, and I assure you of this, to cut down on the certs granted. Byron White, as you know, is always dissenting because he thinks and sees a conflict out there somewhere. Whenever there is a conflict, even though it is old, he wants it granted. He doesn't believe in tolerable conflicts (to use a term that Chief Justice Burger invented a while back). The Solicitor General, we feel, has

filed fewer petitions. In all candor, when the SG files a petition for cert, he has a better chance of getting it granted than, I suppose, the average lawyer does. * * * [tape had to be turned over] facilities available to him of conflict out there or more specifically he knows of the importance of the issue to the United States Government. But there are fewer cases that have been filed by the SG. I think that is a factor. One or two jokingly refer (here is where I get in trouble again) that the Reagan-Bush Administrations have appointed so many federal judges particularly on the court of appeals that the five that are currently in control of the Supreme Court are of a like ideological mind and hence we won't grant cert on what they decide. Those are fighting words, aren't they, Mr. Chairman, but it anyway, it has been announced by one or two members of the Court. I won't name them for fear I will get in deeper trouble.

So far as the seven states that make up the Eighth Circuit are concerned, as one of my predecessors here this morning pointed out, this has been a source of important litigation this term. I think it is usually true. I think the Eighth Circuit and the states here seem to have important cases that crop up every year. Many of these have been mentioned and I won't go into them in detail. Just let me list them. I might say that there are two pending for the October term. One is Grogan vs. Garner, the question of bankruptcy fraud and the standard of review or standard of burden of proof, whether clear and convincing evidence is necessary. That is up from the Eighth Circuit. There is one from the Supreme Court in Nebraska which concerns 1983 in the violation of the confrontation clause again. Well, I will give you these not in order of importance, not in order of decision, but just to mention them. The Jenkins case, the Kansas City schools, affirmed in part, reversed in part, in an opinion by Justice White. I think buried in that case is something of importance to the practicing lawyers, but I think the Eighth Circuit has cured it, and that is the question of when time begins to run when a petition for rehearing is filed. Bear in mind that a bare, naked petition for rehearing

en banc will not stop the time. The rule seems to be that you have to have a petition for rehearing by the panel and then have it supported if you wish with a suggestion for rehearing en banc. I understand now the court of appeals has a rule that treats every petition in a double manner. North Dakota vs. the U.S., the question of the supply of intoxicants to federal enclaves which the Attorney General of that state argued, and there was a reversal there in an opinion by Justice Stevens. The Taylor case involving the statute concerning enhancement of penalties by those who have been convicted of violent crimes including, arson and burglary, and the issue was what burglary meant. Did it mean burglary as defined in the common law or something else? There was a vacate and remand. The Perpich case which has been mentioned. Justice Stevens wrote. The Maysland case, the filed great doctrine out of the Eighth Circuit. Justice Brennan wrote. The Hodgeson case has been mentioned. Justice Stevens did that one on an affirmance although he was in partial dissent. The American Trucking case. A case that concerned Arkansas taxation, argued twice and finally came down, affirmed in part and reversed in part. Reves vs. Young and Co., the question whether a cooperative's demand notes were securities. Justice Marshall wrote a reversal. The Krusan case has been mentioned. Minnesota vs. Olson, and so forth. I might mention two others. Whitmore vs. Arkansas out of the state court side. The death penalty and whether a next friend may represent the defendant. Deto vs. the State, another death penalty thing. Well it is a pretty good result. I am sure there are some reversals there but bear in mind, those of you who are judges, that if cert is granted, I think the chances for reversal are greater then the chances for affirmance. A long time ago at one of these Conferences I took the liberty of reviewing my own record when I was on the court of appeals and it wasn't very good. I got reversed a lot more times then I was affirmed and I will always remember Justice Goldberg in one case affirming what I had written said we were right but for the wrong reasons. Then, of course, I should mention the flag case which the Solicitor General argued so

earnestly. I think another important one for those of you interested in the religion clauses is the peyote case out of Oregon where the Court again on a close vote ruled against the Native American Indian position in that case. I can go on for twenty minutes on that case, but I won't.

In prior meetings here I have discussed things in the Supreme Court and almost inevitably I see in the media the next day or a week later that I am much more candid then my colleagues are. I get into a little trouble. They never complain. As a matter of fact they kid me about it and say you should have said it three or four years ago. This year I took the liberty of deflecting this a little and I asked my four clerks to give me independently their evaluation of the Term. I am going to read what they wrote. I asked if I might; they said yes. So I am deflecting a little bit. This is what they said. This isn't what I said. Pretty slick! I sound like a lawyer, don't I!

Here is one end of the term summary. "It seemed to me that in most of the major highly publicized cases, the Court continued its trend favoring wider latitude to the states especially in areas such as the death penalty, criminal procedure, the First Amendment. The Court's overall agenda seems to be to reduce federal oversight of state's majoritarian policies even in areas where federal control may be crucial to the protection of civil rights. I think that the Smith case, [that is the peyote] and Washington vs. Harper and the death penalty cases are especially disturbing examples of this trend. But there were also some surprises, some unexpected softening of the Court's conservatism." That's one.

The second. "Just a few random thoughts and reflections. (1) The clear evisceration of federal habeas, see Butler, Saffle, etc. This development puts more pressure on state courts to insure federal constitutional rights. It also tends to freeze the law of federal criminal procedure. (2) The puzzlement of Justice White. He is with the four conservatives in all capital cases but continues to be unpredictable and at times liberal in civil rights cases. [He has always been that way.] See for instance, Zinermon,

Missouri vs. Jenkins, the FCC cases, Routon. (3) The Smith, the peyote case, and the dim future of free exercise of religion. (4) Justice Scalia. He writes more frequently and sometimes gets others, especially Justice Kennedy, to follow. He is always looking for opportunities to push his agenda, for example, Smith and Burnham. And he constantly pounds home his familiar themes, especially the nonuse of legislative history. Yet he is not as faithful to his interpretative principles as he would have us believe. For example, in Kansas and Missouri, the Illinois Brick Company issue, he completely ignored without explanation the 'plain meaning' of the text he was interpreting. What are the causes of the reduction in the number of cases heard? The elimination of appellate jurisdiction? Conservative Reagan appointees in the lower courts? Why has the SG sought cert in fewer cases? The flag burning case. It is remarkable to me that the flag burning case was 5-4. Does anyone respect precedence? (7) A recurrent theme this term has been the issue of lower courts abusing their discretion. This question came up in the Yonkers and the Jenkins cases as well as in the Louon case. It is also coming up on the context of capital stays. Has the Court's attitude toward lower court exercise of discretion changed? Have the Court's decisions been consistent?"

The next one comes from probably the most liberal of my four clerks. "I will start with my impression of some of the Justices. [Well, I feared the worst!] I think that the Chief is very tired. This may be the reason behind his peevishness from the bench. [If you are down there arguing and he jumps on you, don't be too concerned, he's done it before.] (2) I think Justice Scalia still does not understand how to get a Court. [By that we mean five votes.] He challenged the Court in Burnham and lost. My view is that despite his constant writing and his constant pushing for his agenda, he may have become more marginalized this year. [Some of you may have seen the recent, I think Legal Times headline, Mr. Justice Scalia a leader without followers, that is what she is talking about.] He also has shown he is not always as faithful to

his plain meaning as he would have one believe, see Kansas. Justice Kennedy has evidenced that he gets some satisfaction by writing an emotional opinion. He received accolades for his separate writing on the flag case last year and this may be the reason behind it. [I personally think that was Tony Kennedy's best writing since he has been on the Court, his separate opinion on the flag burning case up from Texas. He told me he agonized with that issue over the weekend, wrote it personally, and I told him I thought it was good. His part five in Akron, which I mentioned, is another example of this kind of writing. I also note that he read most of that part five for which he did not have a court from the bench. I find it difficult to predict emerging trends because so often Justice White is the key person on the Court and it is hard to predict what he will do. He certainly has shown that the conservatives do not have him by the tail in the civil rights area.] There was a glimmer [it is hers now, not mine] there was a glimmer of hope this year in the abortion area when Associate Sandra broke with the conservatives in Hodgeson. At least she is now on record as finding an abortion statute that she could not uphold. I do think as the Court stands now, the right to abortion will not be abrogated. She does not want a leadership role in this area. It may be up to Stevens to try to find some middle ground where she can feel comfortable. The five conservatives are definitely in the driver's seat in the death penalty area. Justice O'Connor seems to have abandoned her concurring role after Penry. And, of course, the most amazing thing that happened this year and the issue that stands out the most in my mind for the entire Term is the Court's pointed and calculated evisceration of federal habeas. Retroactivity in both the criminal and civil area has been of intense interest to the Court and will continue next year with the Jim Beam case. Standing was also an important procedural issue this term. There is a noticeable decrease in interest in any death penalty issues but a palpable interest in the issues surrounding punitive damages. The Court's decreasing caseload is a puzzle," and so forth.

And the last one. "My strongest reactions to the Term have involved the Court's capital punishment decisions. The most obvious point is that the capital defendant almost always, except for McKoy, loses. Even McKoy went down to the wire and it was squarely controlled by a case decided only two terms ago."

Let me interpolate my own comment here on death penalty cases. I think there were seventeen scheduled this week. Most of them had been stayed, four of them the day before yesterday and I was on the telephone and one was executed, as you perhaps know, and another one was executed last night. So that there is some movement in the capital punishment area. But California has yet to execute somebody. There were two listed for this week and were stayed by the Supreme Court of that state. I suppose the local political situation out there is such that this is what is going to happen in California. In Florida we have this problem of the ill functioning of the electric chair. It looks as though the Supreme Court of Florida is now going to stay all of its tentatively scheduled executions until they get a new chair.

"Justice O'Connor who had formerly been a moderate voice on death penalty issues voted on the state's side in every case. Justice Kennedy who had provided the fifth vote for stays on a few occasions became noticeably more extreme. The 5-4 vote in capital cases has become monotonous in its regularity by the end of the term. [The one who was executed last night in Virginia, as I assume he was, was also a 5-4 decision.] What was striking to me though was not simply that capital defendants consistently lost, but that the Court displayed a new aggressiveness in speeding up the process of execution. The Court showed a new willingness to vacate stays issued by lower courts. [I think I am safe in saying that before this year, we did not vacate a stay that was issued by a lower court.]

The Chief Justice has advocated legislative proposals designed to quicken the process of appealing capital sentences. The Court fundamentally transformed the nature of federal habeas and while Teague and its progeny are not restricted to capital cases, I think

there is no doubt that these decisions are motivated by the current state of death penalty litigation. In Clemons the Court approved a role for appellate courts that is simply unknown in other areas of the law. In short, the Court's consistent rejection of capital defendants' claims was not simply the result of judicial passivity or exaggerated deference to state officials. Instead, the Court actively sought out opportunities to assist the states even to the point of distorting the normal rules of adjudication. In other ways as well, the five-Justice majority has asserted its control. Certainly these Justices can dominate oral argument and they also seem to have a disproportionate role in choosing the Court's docket. Particularly in the criminal context, state-on-top cases have a far greater chance of being granted then do cases in which the defendant is the petitioner. You asked earlier in this term if we could list the cases in which Justice Scalia wrote for himself alone. I have found eleven [and she names them]. What is striking to me is that only two of them did Justice Scalia dissent from any portion of the Court's judgment. Thus, while he has an obvious inclination to write separately and while he often disagrees with the Court's reasoning, the volumes of his separate writings do not reflect frequent disagreement with the outcome of the Term's cases. Justice Scalia has also written three opinions in which only Justice Kennedy has joined. On two other occasions, Justice Kennedy has written opinions in which only Justice Scalia has joined."

I give you that because I think there is a little color in those comments. I agree with some of them. I don't agree with all of them but at least it comes from another observer's point of view. I hope that isn't in bad taste but I thought you might enjoy it.

I might say what I have said publicly in some other appearances. I think this year, for the first time really, there is a five-Justice majority in control of the Court. I think it was not true last year. The center was crumbling but every now and then it is held. This year, except for racial cases, I think the

combination of the Chief Justice, Justice White, and the three Reagan appointees, O'Connor, Scalia and Kennedy, realize they have the control of the Court and are going to make the most of it. This has always been done. I am not critical;, that is the way the system works. But as one of the clerks pointed out, Justice White is the pivotal vote in certain areas, but in law and order, in criminal cases he will nearly always be on the side of the prosecution. Where do we go from here? Dottie says that for ten years I have been saying the Court is going to change, people are getting old and they are going to retire or die and she said it doesn't seem to happen very much. There are three of us now who are over eighty. Before Justice Powell retired I was able to say there were four, three of whom were older then I, but the two others are older than I. I remind them of it; they don't like it very well! Of course, one never knows who is next to go off the Court. One never knows what will actually happen. The news media I have noticed has engaged lately--Time and Newsweek--I love the article in Newsweek showing photographs of possible appointees, when they referred to the last day of Court thinking that that is when a retirement is announced and it was anticipated that Justice O'Connor and the elderly Harry Blackmun would do, and Brennan and Marshall gave me a hard time on that one, I can assure you, because they weren't even mentioned. Well, you know as much about this as I do. Our esteemed good friend the Solicitor General is mentioned as is Judge Higginbotham of the Fifth; Judge Wilkinson of the Fourth (Harvey Wilkinson, Justice Powell's old clerk and one of his proteges); Judge Wilkins of the Fourth, I think Senator Thurmond's obvious choice; Judge Posner of the Seventh with a question mark; Judge Easterbrook of the Seventh; Clarence Thomas, the new appointee of the Court of Appeals of the District of Columbia Circuit who, some say, and I am not saying this, some say is being groomed to succeed Justice Marshall. I suppose when Thurgood retires or steps off the Court in some way this will be a real problem for whatever administration is in power because most of us, I believe, don't like the idea of a northeastern seat or a Jewish

seat or a Negro seat or that kind of thing, but Thurgood has been the only Black ever to have served on the Court and if he goes off, what then? You know Thurgood has moved--for a long while he never used the term Black. He always used the term Negro. Now he doesn't use that term. Now he uses Afro-American. I said, "Thurgood, how can I keep up with you? What is the next term you are going to want?" He said, "just follow me, just follow me." Well, on the Democratic side, I suppose if there were a Democrat in the White House at least two would be considered. One is Lawrence Tribe of Harvard Law School, maybe. Larry would like it, I am sure. Amalya Kearse of the Second Circuit. A very able Black. Those of you who like bridge, she has been national bridge champion, too. John Stevens is envious and doesn't know where she gets the time to do that. How much time do I have?

Hon. Pasco M. Bowman: As much as you like.

Hon. Harry A. Blackmun: ~~I could stop here, but let me assume a personal privilege. I mentioned before that~~ It has been thirty years since I have had the privilege of being on the federal bench and twenty years since I have been in Washington. It seems like yesterday since that happened. A year ago, two years ago really, at New Year's, Mrs. Blackmun and I accepted an invitation to go to Hilton Head, South Carolina, for what was called a Renaissance weekend. ~~Maybe some of you here~~ have been down there for that occasion, which has been going on for a number of years now. It is run by a man named Phillip Lader, a former college president and former candidate for the governorship of South Carolina, a very able young man. I put it off until our lawyer daughter called one day and said, "We have been invited. If we go, will you go?" So two years ago we went and we went again last year.

There, a number of families gathered to discuss common problems over the New Year's weekend. Those discussions ranged from the details of everyday family life with its crises and its disappointments to the national and international situations. It proved for us as newcomers to be a happy and an excellent way to spend the days and the nights at New Year's. I was given two

assignments the first time I was there, the primary one was with Admiral Zumwalt of Agent Orange fame, and Eugene Patterson, the retired publisher of the St. Petersburg Times, a man distinguished in the journalism profession. The designated subject, I was told this when I arrived, was, "What I have learned." Well, at first I thought it had to do with the seminar sessions and hence I had better go to every seminar I could. It is like a three-ring circus; there are always three or four going on at the same time. Then I realized that it related to life's experiences themselves. What have I learned? That question leads to others more specific and more pointed. Learned about what? Human nature? Constitutional law? About jurisprudence? That feet today indeed are often made of clay? That there seems to be an element of larceny and the unethical in so many people in public life? That life is or can be cruel? That man's inhumanity to man still prevails? That life itself is controversial? That we still are a racist and intolerant society?

I think I have learned something about our country. It is richly endowed. It has its beauty. It has its shame. Its people are mixed and constantly changing. It is subject to pressures from without and from within. And yet it has existed as a very special nation for over two hundred years under a blueprint for government we call the Constitution and under a Bill of Rights and additional amendments. We hope that it may continue to operate under them for some time to come. We know there are two political branches, the Executive and the Congress, and on the other hand, the Judiciary. The doctrine of separation of power seems generally to work for us.

I think I have also learned something about the Supreme Court itself. That it generally is hard working, responsible, tries to do its job, and usually operates with respect and consideration among the Justices. The power of the Court is awesome and it is the end of the line. There is no other place usually for a litigant to go. The Court had better be right. There are, however, self-inflicted wounds, the Dred Scott decision in 1857,

the legal tender cases of the 1870's, and the first income tax case in 1895. There is a distinct richness in its history through 105 Justices and 16 Chiefs and through what now amounts to about 490 volumes of the U.S. Reports, literally the judicial history of the Court.

Let me speak in a more intimate vein as to what I think I have learned. I regard most of these as aspects of personal need. I make no apology for it. For perhaps these needs or some of them are your needs too. The order in which I give them to you is not the order of their importance. First is the need for intellectual refreshment. Last summer Dottie and I, instead of relaxing somewhat as my colleagues always advise me to do, particularly Justice Powell, without success, accepted two opportunities to participate in two seminars thousands of miles apart with profoundly different kinds of participants and yet it seems with a common aim. The first I have mentioned is the one at Salzburg in Austria in July. There, a continuing program in American studies takes place at the Schloss Leopoldskron. The Schloss is the mansion that many of you will recall is the primary site of the movie, The Sound of Music. That is it and that is where the seminar takes place. We were there with five other American faculty members for a two-week seminar on American Legal Studies. There were fifty-six in attendance. These were promising and successful young lawyers, law teachers, public servants, and judges from all over Europe, some from--a few from Northern Africa and the Far East, India and Pakistan; and there were a number from behind the so-called Iron Curtain as it existed at that time. They were interested in American law and what our system is and how it operates and its strengths and its weaknesses and how it compares with judicial systems elsewhere.

The adventure, just as we had experienced it once before twelve years ago, was provocative and stimulating. The faculty, consisting of a federal appellate judge, four law professors of distinction, and myself found it particularly challenging because not only were we outlining and describing our system, but we were

forced to defend it somewhat, and in any event, to examine it critically. Perhaps it was not the easiest assignment, but it was a worthwhile one. I found this always to be the case: When one gets away and looks microscopically at what we were inclined to accept as granted under the pressures of professional life that we live all the time or judicial activity here in the United States.

The second seminar was in August when Professor Norville Morris of the Law School of the University of Chicago and I for the eleventh consecutive year tried to co-moderate a seminar in Aspen on the topic, "Justice and Society," some of you here have been there. There were twenty-two participants: a state supreme court judge, one from Minnesota; three law professors; practicing lawyers; a physician; a journalist; a civil rights activist out of South Africa; a corrections official, and others. The preparatory readings are fairly extensive, and we start with civil disobedience and move on to law and morality and justice and autonomy and freedom of speech, economic equality, racial discrimination, gender discrimination, justice in the family, the proper scope of the criminal law, criminal sanctions, and finally, justice in the international context. The seminar is another opportunity to look at the legal assumptions that we are prone to accept in day-to-day practice and in judging and to examine those assumptions critically to see if they are really sound.

At the end of that two-week period I am always intellectually drained, but I hope that I return with some of the cobwebs swept away and with a better approach to the problems that will confront us in Washington during the upcoming Term. It is a shaking and somewhat disturbing process, but for me that is good.

The second is the need for a sense of individuality and individual importance and of obligation. I try to stress this when I speak at a college or law school commencement. Each of us is a person and each of us has a place in this world and each of us has the opportunity to accomplish and to contribute and to afford a measure of happiness to others. And yet in a distinct sense, one

could be said that we are not important at all. Here we are, as I said the other night, living in the United States in the closing years of the twentieth century, struggling, to be sure, with problems and with inequities and nevertheless enjoying our places as beneficiaries of what others have produced for us, the founding fathers and inventors and musicians and scholars and parents and associates and complete strangers. Each generation is but one in a long line stretching far back in history and how indebted we are to those who have gone before us.

Third, I think, is the need to realize that law and morality are not necessarily the same. Surely our law ought to be, and I sincerely hope that it is, based on moral principle, but some things that are legal are not necessarily moral. Or to put it oppositely, some things are illegal that are not necessarily immoral: jaywalking, I suppose. One need look only at the Tenth Commandment, "Thou Shalt Not Covet," to realize this. I know of nothing in the law that says that covetousness is illegal.

The fourth is an open mind. On most major issues in the law, particularly in constitutional law, there are two sides to the case. Cases at the appellate level in the federal courts nearly always are close, and sometimes a poor brief conceals this fact, but one may not assume that the answer is automatic. This, of course, accounts for the agony of decision. Some judges do not suffer from that affliction. I think a lot of them do. Being on a multi-judge court, as the appellate judges here will know, does not lessen the burden. What is the real answer to some of the issues that center in the great rights under the Constitution? What of the death penalty where two-thirds of our states now have it? What of abortion? What of a suggestion to terminate extreme lifesaving measures? What of child abuse? What of the deprival of parental rights? There are two sides to almost every question.

The fifth is to accept our diversity. This country proudly has regarded itself as a melting pot. Although it has not always welcomed new persons to that pot, we are a nation of Jews and

Catholics and Protestants and Blacks and Whites and Asians and all the rest, but Kahlil Gibran reminds us, and I quote, "The pillars of the temple stand apart and yet they all support the temple." There has been strength in our diversity.

The sixth is patience. Rome, indeed, was not built in a day. In the development of the law, we usually move one step at a time. The frontier is pushed back gradually. Oliver Wendell Holmes, Jr. said that "the law always is behind the times" and that "it is proper that this is so."

Next is not taking one's self too seriously and maintaining a sense of humor. Each of us has his foibles, and one must be sympathetic to this in other people and one must, from his own contentment point of view, be able to laugh at himself.

Next is truth. On the pedestals that flank the impressive west stairs of the Supreme Court Building in Washington are two statues by the noted sculptor, James Earle Fraser. Another Fraser statue is in Rochester, Minnesota, from which we came. It depicts the Mayo brothers in their surgical gowns, but what struck me most always about that statue is its inscription below it. It is this: "They loved the truth and sought to know it."

What is truth? In science and in medicine one has, I suppose, a fair idea of what truth is. It perhaps is the ultimate factual answer. But in life generally and in the law in particular, what is it? I like to think perhaps simplistically that in this context truth, at the very least, is justice and, specifically, is that equal justice we profess.

The next is accepting the inevitable. Some years ago a great surgeon on his seventieth birthday was honored by the American College of Surgeons. In his response he said this: As I have watched older men coming down the ladder, as down they must come, with younger men passing them, as they must pass to go up, it so often has been an unhappy time for both. The older man is not always able to see the necessity or perhaps the justice of his descent and resents his slipping from the position he has held instead of gently and peacefully helping the passing by assisting

the younger man. What pleasure and comfort I have had from my hours with younger men. They still have their imagination, their vision, and the future is bright before them. In each day as I go through the hospital, surrounded by younger men, they give me of their dreams and I give them of my experience and I, I get the better of the exchange.

The next is courage. Justice Brandeis said, and this was referred to in one of the earlier comments, "If we would guide by the light of reason, we must let our minds be bold." That is not the easy way. The easy way is to be carried along in the current of public opinion as contrasted with legal principle. Public opinion and popularity change, principle seldom does; and if it does, it changes slowly. Courage and decision making is necessary.

The next is recognizing and accepting one's fallibility. I need not even quote Justice Jackson's famous remark about that; it needs no further explanation.

The next is a proper perspective. The story is told about Marian Anderson, I think the gray hairs here in the audience will remember the great contralto of a few years ago. An incident from her life shows the depth and purity of her character. Sol Hurok, who was then living and was an impresario, once told Billy Rose that he was present when reporters were interviewing Ms. Anderson. They asked her to name the greatest moment in her life. Hurok knew, relates Billy Rose, that she had many to choose from. There was the night when Toscanini told her that hers was the finest voice of the century. There was the private concert she gave at the White House for the Roosevelts and the King and Queen of England. She received the Bach Award as the person who had done most for her home town of Philadelphia. And to top it all, there was the Easter Sunday in Washington when she stood beneath the Lincoln statue and sang for a crowd of 75,000 people. Which of these moments did Marian choose, Billy Rose asked. None of them, said the impresario. Ms. Anderson told the reporters that the

greatest moment of her life was the day she went home and told her mother she wouldn't have to take in washing anymore.

The next is respect for the environment. Over fifty years ago when I returned from law school to the Twin Cities, I was fortunate, largely through Judge Sanborn, actually, to meet two young men who proved to be the best canoeists I've ever known. They asked me to join them on their annual trek into the canoe country of western Ontario--this is north of the well-known Minnesota Arrowhead and a much wilder area. We started usually on Rainy Lake at Fort Frances. Our favorite trip was to move northeastward into the so-called Manitou country and eventually cross the Continental Divide and finding the headwaters of the Turtle River and coming down that very attractive stream back into Red Gut Bay of Rainy Lake. The trip is about 250 miles and took between two and three weeks, depending on the weather. We never saw anyone, anyone at all, other than a lone Native American. Animal life was plentiful, fishing was there for our needs, beauty, quiet, the earth at its full, pure water, sunshine, rain, cold, misery when we were windbound, but it was a time close to nature and close to each other and it was this, I think, that made me appreciate something that Justice William O. Douglas wrote. Douglas, as you know, is a controversial character. Some of you are critical of him; others will praise him. We have a custom at the Court that when a Justice retires, his colleagues write him a letter of farewell and then they purchase his bench chair from the government and present it to him. This was done when Douglas, ill and broken, retired in 1975, and his response to the Court's letter is Douglas at its best in my view. I read most of it. "I am reminded of many canoe trips I have taken in my lifetime. Those who start down a water course may be strangers at the beginning, but almost invariably are close friends in the end. There were strong head winds to overcome; there were many rainy days as well as sun-drenched days to travel. The portages were long and many and some were very strenuous, but there was always a pleasant camp and the stand of white bark birch and water concerts held at night

to the music of the loons and inevitably there came the last campfire, the last breakfast cooked over last night's fire, and the parting was always sad. And yet, in fact, there was no parting because each happy memory of the choice parts of the journey and of the whole journey was a harmonious, united effort filled with fulfilling and beautiful hours as well as dull and dreary ones. The greatest such journey I have made has been with you, my brethren, who were strangers at the start but warm and fast friends at the end."

The next is clarity. This is the one that was referred to before. In 1921 at Yale Law School, a jurist gave a series of lectures. He was then the distinguished chief judge of the court of appeals of the State of New York. He later went on to become a distinguished Justice of the Supreme Court of the United States, though only for a few years. In the first of these lectures, he said this: "The great generalities of the Constitution have a content and a significance that vary from age to age. Interpretation becomes more than the ascertainment of meaning and intent of lawmakers whose collective will has been declared. The work of a judge is in one sense enduring and in another, ephemeral. What is good in it, endures; what is erroneous is pretty sure to perish. In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." That was Benjamin Nathan Cardozo speaking sixty-nine years ago. How does it bear on original intent?

The next is faith. In an address at Princeton not too long ago this was said: "What a man knows at fifty that he did not know at twenty boils down to something like this. The knowledge that he has acquired with age is not the knowledge of formulas or forms of words but of people and places and actions, a knowledge not gained by words, but by touch, sight, sound, victories, failures, sleeplessness, devotion, love, the human experiences, and emotions of this earth and perhaps, too, perhaps, too, a little faith and a little reverence for the things you cannot see." Those are not the

words of a clergyman; they are not the words of a professor of divinity at a school of theology. They are the words of an American politician who almost made it to the presidency.

The next is a sense of urgency. These words have been attributed to different persons. I like their attribution to William Penn, for I think they come naturally from him when he was at the height of his influence a century before the founding followers. Here they are; you've heard them: "I expect to pass through life but once and if, therefore, there be any kindness I can show or any good thing I can do to my fellow being, let me do it now and not defer or neglect it as I shall not pass this way again."

Dr. Allan A. Stone was a psychiatrist on the faculty of the Harvard Law School and six years ago wrote a book entitled, Law, Psychiatry, and Morality. I read a few words from his closing paragraphs of that book. "When we move from the safety of our office to take action in the real world, we usually are motivated by the same moral enterprise that guides us in our office--a mixture of compassion and understanding and art and science. The world outside our office may seem increasingly treacherous, but that treacherous world is already inside our office if only in microcosm, and our work can never be carried on in a moral and historical vacuum. We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition; and until our composite sketch becomes a true portrait of humanity, we must live with our uncertainty. We will grope, we will struggle, and our compassion, our compassion may be our only guide and comfort."

The next is dreaming a little, remembering our values, those that brought us to where we are and here to this place today.

The next is taking care of the house. The late Edmond Cahn, professor at the law school of New York University in 1963, (that is a long time ago) edited a book called, The Great Rights. His closing lines state what ought to be the obvious, but let me read them. "Freedom is not free. Shaping and preserving a new kind of

society necessarily involves personal commitment, costly risk and constant effort. The cultivation of civil liberty can be no more passive than the cultivation of a farm. A man can inherit the land on which he lives. He can even inherit the first crop of produce after he takes over; but then if he stops, everything stops and begins to crumble. Nothing grows, nothing ripe and rewarding comes to him unless he plows and plants and tends the soil and unless he keeps it fertile year after year with the chemistry of effort and a forethought."

Let me close by waving the flag a little bit. I make no apology for this really. I think it is not inappropriate on a bicentennial occasion. We have in this country a little document called the Constitution of the United States. It is brief and to the point and imperfect. I have a copy over there somewhere, maybe it is here. That copy consists only of thirty pages. It was given to me by Hugo Black; he gave me three copies, actually. I wore one out; I lost another or somebody swiped it, and this one has to hold out. Eighteen are the original document, and of those, one and a half pages are signatures. The remaining pages are the amendments. It has been with us for two centuries now. It bends but it has not broken. It is flexible, thanks to the wisdom of the drafters. And yet beyond this, there is what Professor Walter F. Murphy of Princeton University has called the larger Constitution. He defines this as the basic document, plus the amendments, plus judicial interpretation, and plus the second paragraph of the Declaration of Independence.

Philosopher Mortimer Adler has put it in a slightly different way. He has said that the American testament, the American testament consists of the Declaration, the Preamble to the Constitution, and the Gettysburg Address. I think if I had been asked, I might have added the second inaugural of 1865. But let me, however, read a few sentences from two of these documents. You know them; most of you probably know the sentences by heart. The first: "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain

unalienable rights and that among these are life, liberty and the pursuit of happiness and that to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed." Fifty-six significant words. The second: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Fifty-two significant words. The two together, 108 words. Nothing more really needs to be said. That's what it is all about or should be in this country.

We are all in this together, practicing lawyers, professors, those on the state bench, those on the federal bench, and how vulnerable generally we all are, how much we need each other as we move along through the years allotted to us under what has been so repeatedly referred to as the rule of law. I think it comes down to what we really believe. If we have belief, action is up to us. Thank you for being so patient.